No. 95-1958

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Supreme Court of the United States
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WINFRED WAYLON JACKSON,
Petitioner,

v.

CITY OF ATLANTA, TEXAS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER' S REPLY TO RESPONDENT' S BRIEF IN OPPOSITION TO CERTIORARI

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I.

In their brief in opposition to the petition for a writ of certiorari, respondents argue that there is no conflict between the circuits, relying on erroneous readings of both the decision below and the contrary decisions of other circuits.

The specific issue presented by the petition herein is whether Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, is the exclusive remedy for claims of employment discrimination brought by state and local government employees, to the exclusion of 42 U.S.C. § 1983 or, indeed, 42 U.S.C. § 1981. The Fifth Circuit unequivocally held that it was:

> The governing statute, Title VII in this case,

> provides Jackson's exclusive remedy. Congress intended for Title VII—with its own substantive requirements, procedural rules, and remedies—to be the exclusive means by which an employee may pursue a discrimination claim.

73 F.3d 60, 63 (5th Cir. 1996), App. p. 6a (footnote omitted).

Just as unequivocally, the Second Circuit in *Annis v. County of Westchester*, 36 F.2d 251 (2nd Cir. 1994), held that Title VII was *not* the exclusive remedy for such claims, but that a public employee can bring an action for discrimination under § 1983:

> Congress undoubtedly and repeatedly considered the exclusivity question and, in the end, resolved not to make Title VII the sole statutory remedy for employment discrimination by state and municipal employers that amounts to a constitutional tort.

36 F.2d at 255 (footnote omitted). See also, *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987), cited by *Annis*.

Moreover, the circuits are in direct conflict with regard to the rationale advanced for the Fifth Circuit's holding that Title VII was the exclusive remedy. Thus, the Fifth Circuit held that:

> Allowing a plaintiff to state a discrimination claim under § 1983 as well would enable him to sidestep the detailed and specific provisions of Title VII.

73 F.2d at 63, App. at 6a (footnote omitted). The Second Circuit, on the other hand, rejected the lower court's holding that a plaintiff must satisfy the procedural requirements of Title VII. 36 F.3d at 254, 255.

The respondents' argument that there is no conflict is based on language in *Annis* to the effect that Title VII is not the exclusive remedy for employment discrimination claims that are "cognizable under the Constitution." 36 F.3d at 254. Opposition to Petition for Writ of Certiorari, 5, 6-7. However, the import of this language is only that § 1983 can not be used to challenge alleged employment discrimination that would not violate the Constitution, *i.e.*, discrimination that violated equal protection or due process. To the extent that other types of discrimination were not also constitutional torts, section 1983 could not be used.

In the present case, of course, the facts alleged clearly establish a violation of the fourteenth amendment, in that they allege discrimination based on petitioner's race. Thus, the decision below cannot simply be read as holding that the complaint in the case was irremediably deficient in that it did not mention the Constitution; such a holding would violate the basic principle of federal procedure that a complaint will not be dismissed if the facts alleged set out a cause of action cognizable under federal law. If the only point of the Fifth Circuit's decision was that there was a defective allegation of jurisdiction under Rule 8(a), F.R.Civ. Proc., the cure would be a remand to permit petitioner to amend the complaint under 28 U.S.C. § 1653, not dismissal.

II.

Moreover, as pointed out in the petition for a writ of certiorari, the complaint did in fact plead section 1983 as the basis for a claim under 42 U.S.C. § 1981. The Fifth Circuit's decision is, therefore, only comprehensible as a reiteration and expansion of its earlier holding, cited by respondents, that Title VII is the exclusive remedy over a claim previously cognizable under section 1981. *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). Once again, the rationale for the holding in *Carter* is that a plaintiff should not be able to bring an action under section 1981 because that would permit the evasion of the procedural requirements of Title VII. 912 F.2d at 839.

While petitioner agrees with respondent that the continued vitality of *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989) may be questionable because of the addition of subsection (c) to section 1981 by the Civil Rights Act of 1991, this only highlights the importance of the issue presented by the petition in this case. Certainly, the lower federal courts need guidance as to whether other statutory remedies are still available to victims of discrimination in employment that is covered by Title VII.

III.

The need for review and guidance by this Court is highlighted by respondent's discussion of the decisions of the various circuits cited in *Annis*. It is clear that the Second and Fifth Circuits are in direct conflict. It is also evident that the other circuits are in substantial disarray, with holdings that, in general Title VII is not the exclusive remedy, but with qualifications of that general rule in other decisions.

Thus, as noted in the petition at pp. 8-9, nn. 4, 7, both the Sixth and Tenth Circuits have handed down decisions that are equivocal on the issue. In *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984), the court's *holding* was that since the only illegal act that was proven was a violation of Title VII's prohibition against retaliation for filing a charge with the Equal Employment Opportunity Commission, Title VII was the exclusive remedy and 42 U.S.C. § 1983 could not be used. In its more recent unpublished decision in *Willis v. Morris*, 70 F.3d 116, 1995 WL 613642 (6th Cir. No. 95-5107, Oct. 18, 1995) *cert. denied*, 64 U.S.L. W. 3639 (March 25, 1996), however, the Sixth Circuit held more broadly that a claim of sex discrimination could not be brought under section 1983 since Title VII provided the exclusive remedy, citing the Tenth Circuit's decision in *Allen v. Denver Public School Bd.*, 928 F.2d 978, 982 (10th Cir. 1991). However, *Allen* itself appears inconsistent with the Tenth Circuit's earlier decision in *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), which held that employment discrimination claims can be brought under

both section 1983 and Title VII.

In sum, there is both disagreement and confusion among the courts of appeals as to whether Title VII is the exclusive remedy for all claims of discrimination by state and local government employees, or whether some or all of such claims can also be brought pursuant to 42 U.S.C. § 1983 and/or § 1981. The present case thus raises important questions as to whether *Johnson v. Railway Express Agency*, 421 U.S. 454 (1974) has been *sub silentio* overruled, and as to the continuing vitality of *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989). This Court should grant certiorari to resolve these questions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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